86-438

Supreme Court U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RONALD M. ROBERTS

PETITIONER,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOHN GENINS
COUNSEL OF RECORD,
P.O. BOX 14303
ATLANTA, GA., 30324
(404) 523-2838

PETITIONER'S COUNSEL

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1.

Whether fundamental due process rights to testify and present witnesses on one's own behalf--an opportunity to be heard--may be denied by the Merit Systems Protection Board, where the already terminated employee had a statutory and regulatory right to a hearing, which inherently included such due process rights.

a.

Whether such rights are dependent upon a presiding official's arbitrary conclusory adjudication that the employee's counsel is guilty of "disruptive conduct".

c.

Whether such a conclusory adjudication that counsel is guilty

of "misconduct" or such "disruptive conduct", so as to warrant his client's denial of the fundamental due process right to be heard--without specification of the facts upon which such conclusion is based or of any evidence upon which such conclusion is based--is itself a denial of due process under the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i,ii
REPORTS OF OPINONS.....	1
JURISDICTION.....	1-2
CONSTITUTIONAL PROVISION, STATUTE & REGULATION INVOLVED	2-3
STATEMENT OF THE CASE.....	3-11
ARGUMENT	11-17
CONCLUSION	17

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES:	
United States Constitution, Amendment V	2
5 U.S.C. Section 7701	2,3
5 U.S.C. Section 7703	7,11, 13,15
AGENCY REGULATION 5 C.F.R. Sec. 1201.24(c)	3

CASES CITED:

Page

Baltimore & Ohio R. Co. v. U.S., 298 U.S. 349 12

Black v. Romano, 471 U.S.___ 14

Cleveland Board of Education v. Loudermill, _____U.S._____ 12-13

Davis v. Scherer, 486 U.S.____ 13

Grannis v. Ordean, 234 U.S. 385 12

Interstate Commerce Commission v. Louisville & Nashville R.Co. 227 U.S. 88 12

Londener v. Denver, 210 U.S.373.12

Maier v. Ohio, 758 F.2d 1578 14

Superintendent v. Hill,

_____U.S.____.....14

FEDERAL CIRCUIT JUDICIAL CONFERENCE TRANSCRIPTS

108 F.R.D. 465 15,16,17

100 F.R.D. 499 17

REPORTS OF OPINIONS

Petitioner does not believe there are any official or unofficial reports of any opinions below. Copies of same, as received by petitioner, are included in the appendix filed herewith.

JURISDICTION

On April 23, 1986, the judgment sought to be reviewed herein, was entered by the Court of Appeals for the Federal Circuit.

On May 28, 1986 that Court's order was dated and entered denying petitioner's motion for rehearing; and, on June 9, 1986 that Court's order was dated and entered declining petitioner's suggestion for rehearing in banc. Both actions were in response to petitioner's joint motion for rehearing and suggestion for rehearing in banc, filed therein on May 7, 1986.

The juridiction of this court is invoked under Title 28 United States Code

Section 1254.

CONSTITUTIONAL PROVISION, STATUTE & REGULATION INVOLVED

The Constitutional provision which this case involves is the due process clause of the Fifth Amendment to the United States Consitution:

"No person shall ...be deprived of life, liberty or property, without due process of law;..."

The statutory provision which this case involves is Title 5 United States Code Section 7701. "Appellate procedures

(a) An employee, or an applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and,

(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board."

The agency regulation which this case involves is 5 C.F.R. Sec. 1201.24(c)

"Right to hearing.

Under 5 U.S.C. 7701, an appellant has a right to a hearing. Alternatively, the appellánt may choose to have the determination based on the record. "

STATEMENT OF THE CASE

Petitioner's employment with the Federal Aviation Agency was proposed terminated and adjudicated terminated by his facility chief, Ray G. Fitzpatrick, on his charge of "failure to complete training requirements".[1]

Petitioner acting pro se filed a timely appeal pursuant to the aforesaid statute and regulation and requested a hearing thereon. The undersigned represented petitioner at the "hearing" and in all stages of this case thereafter.

Petitioner's appeal of his employment termination was adjudicated denied-without giving petitioner his fundamental due process right to be heard.

The "hearing" was closed by the Presiding Official when Mr. Fitzpatrick's testimony was in the process of being impeached, petitioner was not allowed to testify.

The presiding official stated she was closing the hearing because she said the undersigned would not follow her directions. She also announced she would render her decision on only what she had "heard". She did so, in a lengthy opinion

which is copied in the appendix filed herewith.

Her findings of fact relative to the merits of the controversy may not be challenged because she only heard one side of the controversy-petitioner was not allowed to testify.

Her decision made a one sentence reference to the closing of the hearing-that it was "due to the disruptive conduct of the appellant's attorney"--without any specification thereof.

Throughout the subsequent appeals to the full Merit Systems Protection Board and then to the Court of Appeals to the Federal Circuit, petitioner's briefs have begged opposing counsel to cite <u>any</u> item from the record of the "hearing" evidencing any misconduct by petitioner's attorney.

Petitioner included a transcript of the entire "hearing" as an appendix in the Court of Appeals.

Each of respondent's briefs, throughout the appeals herein, is absolutely devoid of any reference to the evidence, to substantiate misconduct.

The transcript of the "hearing" has been in the possession of the Respondent, the full Merit Systems Protection Board, and was filed as an appendix by petitioner in the Court of Appeals.

Petitioner even tried "to prove negative" by a brief filed in the Court of Appeals to analyze his rationale for what were legitimate cross examination questions, and how he had abided by the directions of the presiding official.

The opinions of both the Merit Systems Protection Board and the Court of Appeals simply conclude, conclude that as a fact there was misconduct.

Those opinions, then erroneously conclude legally that because of their

BEST AVAILABLE COPY

erroneous factual conclusion (that there was misconduct at the hearing by petitioner's attorney (when the record manifests there was none) that petitioner's fundamental constitutional right to be heard, was legally denied.

The Court of Appeals was the Court with federal jurisdiction in the first instance, pursuant to Title 5 United States Code Section 7703; and, should have reversed and remanded for a real hearing pursuant to all of the three subparagraphs of section (c) thereof.

1 The Court of Appeals opinion erroneously finds as a fact that petitioner in three instances failed to report for scheduled training-which is contradicted by Mr. Fitzpatrick's own admission at the "hearing". The one instance petitioner did not report was due to petitioner's belief that his successful completion of same, would

be subject to Mr. Fitzpatrick's desires (which had been manifested when he had not provided petitioner with travel funds only a few hours before petitioner was scheduled to be in school in Oklahoma) because the F.A.A. school there had been subject to the local facility chief's influence as to who passed the Oklahoma school's training.

The presiding official refused to hear testimony of this fact from Mr. Fitzpatrick's predecessor, at petitioner's facility.

This may be the actual reason for this case's treatment.

The documents filed as the record by the F.A.A. prior to the hearing, undisputably show that when the Regional Office of the F.A.A. informed petitioner that the Oklahoma school was no longer subject to influence by the local facility's chief, petitioner requested that he be scheduled immediately for training in Oklahoma; and, that two weeks thereafter Mr.

Fitpatrick intiated the proceedings for petitioner's termination--rather than schedule petitioner for training in Oklahoma.

Petitioner was a full time permanent employee of the F.A.A. That he had a vested property interest in his job entitling him to due process is not disputed.

Petitioner raised his due process contentions contained herein before the Merit Systems Protection Board and the Court of Appeals.

Petitioner appropriately requested oral argument before the Court of Appeals--which simply sent him a request to distinguish this case from all of the other F.A.A. cases resulting from the F.A.A. controller's strike and the President's termination of their employment consequent thereon. When petitioner did so distinguish this case,

the Court of Appeals simply entered its opinion and judgment without allowing oral argument.

Petitioner's request for oral argument was as follows:

> " I believe that the oral argument would aid the Court in deciding the captioned matter because; in my opinion:
>
> 1.
>
> The appeal is not frivilous; and,
>
> 2.
>
> The dispositive issue has not to my knowledge been recently decided; and,
>
> 3.
>
> I believe that the decisional process would be significantly aided by oral argument; wherein, opposing counsel may once again have an opportunity to support with specification from the transcript their conclusory allegations that my conduct at the hearing was so egregious that the presiding official was warranted in closing the hearing without even giving my client an opportunity to present his side of the controversy, or even testify."

The panel of the Court of Appeals which issued the opinion was composed of two Judges, with prior experience in patent and trademark law (including the author) and the other with the

Department of Justice, Tax Division. They apparently felt the Court of Appeals had no jurisdiction to "disturb" the Merit Systems Protection Board decision.

ARGUMENT

Petitioner respectfully submits the Court of Appeals plainly overlooks the clear provisions of Title 5 United States Code Sec. 7703(c).

Minimally, the Merit Systems Protection Board decision was obtained without the procedures required by law being followed. Petitioner requested and had a statutory and regulatory right to a hearing, with counsel. When he was deprived of his right to be heard- to testify, present his witnesses, and cross-examine his prosecutor not only his statutory and regulatory rights were abridged but also his fundamental

constitutional due process right. That he had such a right to be heard has been protected by this Court since the early years of this century. Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S. Ct. 779 (1914); Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 57 L.Ed. 431, 33 S.Ct. 185 (1913); Londener v. Denver, 210 U.S. 373, 386, 52 L.Ed. 1103, 28 S.Ct. 708, 714(1908); Baltimore & Ohio R. Co. v. U.S., 298 U.S. 349, 368-369, 80 L.Ed. 1209, 1224, 56 S.Ct. 797, 807-808 (1936).

Ironically, the pronouncement by this Court upon which Respondent's brief in the Court of Appeals relied for its conclusion that petitioner's "contention that he has been denied his constitional right to procedural due process is totally without merit" is Cleveland

Board of Education v. Loudermill, _____U.S. _____, 84 L.Ed.2 1487, 1491-1497, 105 S.Ct.1487 (1985); which, along with the case cited therein of Davis v. Scherer, 486 U.S. ____, 82 L.Ed.2 139, 154-155, 104 S. Ct.____(1984) are recent directions by this Court that the opportunity to be heard may not be denied.

The "hearing" where these rights were abridged herein was a post termination hearing. Therefore, it appears clear the Court of Appeals erred when it did not apply the provisions of 5 U.S.C. Sec. 7703(c)(2).

Petitioner is unable to find any judicial authority rendering the fundamental constitutional right to be heard, dependent on his counsel's

conduct and none has appeared in respondent's briefs.

Assuming there is such authority or some may deem there should be, any application of same herein would appear to be itself a denial of due process. Superintendent v. Hill, _____U.S._____, 86 L.Ed.2 356,364, 105 S.Ct. _____(1985); Black v. Romano, 471 U.S.___, 105 S.Ct. _____ , 85 L.Ed2 636,647(1985). Any findings of misconduct must be supported by some evidence in the record.

None was cited in respondent's briefs, none was cited in the opinions. The conclusion must be there was none.

It may be noted that the Court of Appeals for the Federal Circuit will not accept conclusory statements (without a factual predicates) to recuse a member of its judiciary. Maier v. Orr, 758 F.2d 1578 (1985). Petitioner has no argument

with this decision; however, simple fairness would seem to require that the same standard be applied to counsel's conduct. Logically, isn't any decision devoid of a factual predicate, clearly proscribed by all three subparagraphs of 5 U.S.C. Sec. 7703?

It is a well know fact that this Court grants the writ of certiorari to only a few petitioners. Obviously, an opinion which was not published may not be as deserving of this Court's consideration. Perhaps, that may be a reason a Court directs nonpublication, as herein. Perhaps, the author of the opinion may have contemplated this in conjunction with her thoughts expressed in 108 F.R.D. 465, that the presiding officials of the Merit Systems Protection

Board are "very good people" who issue and render opinions on a par with those of the federal district courts. 108 F.R.D. 465, 571. Perhaps this has some bearing on the also disclosed fact at the conference that 93% of the Merit Systems Protection Board's decisions are upheld by the Court of Appeals for the Federal Circuit. 108 F.R.D. 465, 556.

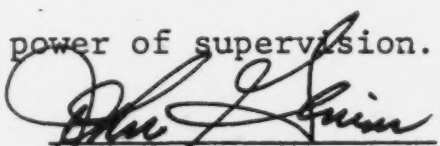
Minimally, what happened herein appears inconsistent with the author of the Court of Appeals opinion statement at the conference that she loves oral argument. 108 F.R.D. 465, 573.

Also, minimally, the undersigned is not the only lawyer who has felt his client was not treated legally

and fairly and also may be why only a few members of the private bar are invited to attend the conference. 108 F.R.D. 465, 551, 564,574; 100 F.R.D. 499, 639-644.

CONCLUSION

It is respectfully submitted that clearly petitioner's procedural due process right to be heard has been denied and the Court of Appeals erred in upholding same; and, that decision is so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.



John Genins
P.O. Box 14303,
Atlanta, Ga., 30324,
(404) 523-2838
Counsel of Record For:
Ronald M. Roberts

CERTIFICATE OF SERVICE

I do hereby certify that all parties required to be served have been served, that being Respondent, Department of Transportation Federal Aviation Administration by my depositing 3 copies of the within Petition as well as 3 copies of the accompanying Appendix (contained in separate envelopes) in a United States mail box, with first class postage prepaid addressed to:

STUART JAMES, ESQ.,
Civil Division, U.S.
Deparment of Justice,
Room 711, 550 11th St.,
Washington, D.C., 20530
and
MARY JONES, ESQ.,
Office of General Counsel,
Federal Aviation
Administration,
Washington, D.C., 20590.

This August 26, 1986.

John Gemins, Counsel for
Petitioner, P.O. Box
14303, Atlanta, Ga.,
30324.

86-438

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RONALD M. ROBERTS

PETITIONER,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

JOHN GENINS
COUNSEL OF RECORD,
P.O. BOX 14303
ATLANTA, GA., 30324
(404) 523-2838

PETITIONER'S COUNSEL

APPENDIX TABLE OF CONTENTS

	Page
OPINION DELIVERED UPON COURT OF APPEALS RENDERING OF JUDGMENT, April 23, 1986	1, 2, 3
OPINION AND ORDER OF MERIT SYSTEMS PROTECTION BOARD, September 11, 1984	4, 5, 6, 7, 8, 9
DECISION OF MERIT SYSTEMS PROTECTION BOARD PRESIDING OFFICIAL, January 6, 1984	10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26
JUDGMENT OF COURT OF APPEALS SOUGHT TO BE REVIEWED, April 23, 1986	27, 28
ORDER OF COURT OF APPEALS DENYING REHEARING, May 28, 1986	29, 30
ORDER OF COURT OF APPEALS DECLINING SUGGESTION FOR REHEARING IN BANC, June 9, 1986	31
CERTIFICATE OF SERVICE	32

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal
	)	
DEPARTMENT OF TRANSPORTATION, FAA	)	No. 85-1968
Respondent.	)	

DECIDED: April 23, 1986

Before BALDWIN, NIES and ARCHER, Circuit Judges.

NIES, Circuit Judge.

DECISION

Ronald M. Roberts petitions from the final decision of the Merit Systems Protection Board (board) in Case No.

AT315H8310757, which sustained his removal from the position of Air Traffic Control Specialist at the Fulton County Airport, Atlanta, Georgia. That removal was based on a charge of failure to complete training requirements, which resulted from three instances of Mr. Roberts' failure to report for scheduled training. We affirm.

DISCUSSION

In the opinion accompanying its order denying Mr. Roberts' petition for review, the full board considered Mr. Roberts' argument that closing his hearing because of the conduct of his representative resulted in a denial of due process. The hearing was closed after repeated warnings that such action would result and a decision made on the

record if misconduct continued. For the reasons stated in the board's opinion, we agree that no violation of Mr. Roberts' due process rights has occurred. That being the sole argument raised on appeal, we affirm the final decision of the board on the basis of the opinions of the presiding official and of the board. No error has been shown which would allow us to disturb that decision. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

85-1968

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD M. ROBERTS v. FEDERAL AVIATION ADMINISTRATION	DOCKET NUMBER AT315H8310757 DATE: SEPT. 11, 1984

OPINION AND ORDER

Appellant was removed from his position of air traffic control specialist by the Federal Aviation Administration (agency). The action was based on a charge of failure to complete training requirements arising from appellant's failure to report for scheduled training at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma. He appealed the agency action to the Board's Atlanta Regional Office. On appeal the presiding official terminated the hearing during the presentation of

appellant's case due to disruptive conduct of his attorney. Her decision affirmed the agency action, finding that the agency's reasons for appellant's removal were established by a preponderance of the evidence, and that the action was taken for such cause as would promote the efficiency of the service. In his petition for review appellant does not challenge the factual findings of the presiding official. Rather, he asserts that he was denied due process when the hearing was terminated without just cause and asks that the case be remanded for a rehearing.

The record reflects that appellant's attorney made an opening statement at the hearing, presented witnesses and cross-examined the agency's witnesses. The Board has reviewed the entire hearing

records and notes that appellant's counsel consistently ignored the presiding official's instructions as to the scope of the evidence to be presented, and agrees with her characterization of his behavior as disruptive. Presiding officials have wide discretion in controlling the course of a hearing under the Board's regulations at 5 C.F.R. § 1201.41(b), and in this case the hearing was terminated only after repeated warnings to appellant's counsel about the consequences of his behavior. Appellant does not contest the factual findings of the presiding official, and there is no evidence to suggest that appellant was not accorded a fair hearing with

regard to the merits of his case. Appellant has not shown how the presiding official's exercise of her discretion to terminate the hearing constitutes an abuse of her discretion.*/ The Board,

---

*/ See Blanton v. Department of Transportation, MSPB Docket No. DC075281F0904 at 2 (July 6, 1983), appellant deemed responsible for actions of representative; no abuse of discretion in closing hearing based on representative's disruptive conduct). Additionally, we note that five months passed from the date of the hearing until the initial decision was issued, without any objection being voiced by appellant to the presiding official's action. In this regard, see Abarr v. Department of Transportation, MSPB Docket No. CH075281F0833 (September 19, 1983), holding that failure to raise an issue to the presiding official concerning his processing of the case may result in waiver of that issue.

therefore, finds that appellant has failed to show any prejudicial error in the presiding official's handling of the hearing. Karapinka v. Department of Energy, 6 MSPB 114 (1981).

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C., 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD

/s/ Stephen E. Manrose
Acting Clerk

Washington, D. C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:

RONALD M. ROBERTS, Appellant, v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Agency.	DECISION NUMBER AT315H8310757 DATE: January 6, 1984

INTRODUCTION

By petition for appeal filed May 26, 1983, Ronald M. Roberts (appellant) appealed from the action of the U.S. Department of Transportation, Federal Aviation Administration, Air Traffic Division, Air Traffic Control Tower, Fulton County Airport, Atlanta, Georgia (agency), removing him from the position of Air Traffic Control Specialist, GS-7,

effective May 6, 1983. The action was based on a charge of failure to complete training requirements.

The appellant seeks reinstatement to his position. In his petition he raised a claim of discrimination which upon close review appears to be a claim of jealousy because of his financial position. The appellant requested a hearing which was held on August 1, 1983, in the Atlanta Regional Office Hearing Room.[1] This decision is based on the submissions of the parties and the hearing tapes. This matter is within the jurisdiction of the Board. See 5 U.S.C. §§ 7701(a), 1205(a)(1), 7513(d) and 7511(a)(1)(A).

---

1 Due to the disruptive conduct of the appellant's attorney, the hearing was terminated during the presentation of the appellant's case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because the action was based on the provisions of subchapter II of chapter 75, title 5, United States Code, the agency has the burden of proving two elements. The first element is whether it has met its burden of supporting the reasons for the action by a preponderance of the evidence. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a)(1)(ii). Secondly, the agency has the burden of showing that the action was taken for such cause as will promote the efficiency of the service, and that the penalty was appropriate. Starkey v. Department of the Air Force, 3 MSPB 377 (1980); Douglas v. Veterans Administration, 5 MSPB 313 (1981).

On the other hand, the appellant bears the burden of proof with respect to the affirmative defenses as described in 5 U.S.C. § 7701(c)(2). The preponderance of the evidence standard applies to any affirmative defense raised by the appellant. Shockro v. Federal Communications Commission, 5 MSPB 181 (1981); In re Robert J. Frazier, Jr., 1 MSPB 159 (1979).

If an appellant can prove an affirmative defense, the action on appeal cannot be sustained. 5 U.S.C. § 7701(c)(2).

Appellant was originally hired by the agency in 1973 and completed the service requirement for career tenure on May 14, 1976.[2]

---

2 See Tab 9, Agency Response.

By letter dated March 22, 1983, [3] Ray G. Fitzpatrick, Air Traffic Manager, Air Traffic Control Tower (ATCT), Fulton County Airport, proposed to remove the appellant based on failure to complete the training requirements of his position. Specifically, the notice set out three instances of the appellant's failure to report for scheduled training at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma. The notice also referenced the appellant's February 1, 1983 resignation effective March 11, 1983, which was withdrawn on March 4, 1983.

The appellant responded to the notice of proposed removal in writing on

---

3 See Tab 10, Agency Response.

April 11, 1983. In his response, he challenged the requirements for the training. Further, he set out the circumstances which resulted in his admitted failure to attend the most recently scheduled training session. After consideration of the appellant's reply, Mr. Fitzpatrick sustained the proposal and removed the appellant effective May 6, 1983. The notice of removal set out the appellant's right of appeal to this Board and this appeal followed.

In support of its action, at the hearing, the agency presented documentary and testamentary evidence. Essentially, the witnesses related that the agency's

training program mandated initial training at the Federal Aviation Administration Academy. Further, the record shows that the appellant was given three opportunities to complete the training and each time he failed to attend the scheduled course at the FAA Academy. The appellant admitted that he did not take the training as scheduled.[4] Instead he cites personal problems as the reason why his training was rescheduled on two occasions. He noted in documents submitted in connection with his appeal the reason why he failed to attend the third scheduled

---

4 An appellant's admission may serve to meet the agency's burden of proof. See McClaskey v. Department of Energy, MSPB Docket No. SE07528110094 (August 16, 1982); Mascol v. Department of the Navy, 7 MSPB 408 (1981).

session. Specifically, he felt that he and his supervisor (Fitzpatrick) had a personality conflict which would result in the Academy's instructors precipitating his failure to successfully complete the course. In support of that contention, the appellant presented several witnesses who testified regarding their perception of the relationship between the appellant and his supervisor. These witnesses painted a picture of a deteriorating relationship between the two men. The evidence presented by the appellant, however, failed to establish that the difficulty between the two men was the result of Mr. Fitzpatrick's attempting to harrass

the appellant because of his outside business interest.[5] I do not find that the appellant has shown any action on the part of his supervisor which would have caused him to fail to attend regularly scheduled training.

In light of the appellant's admission that he failed to attend scheduled training and the evidence of record, I find that the agency has proven the basis for the removal action by the requisite preponderance of the evidence.

As noted above, the appellant raised the issue of discrimination in his

---

[5] The record is replete with references to the appellant's horse farm.

petition. At the hearing, he did not present any evidence to support that claim. I therefore consider appellant's claim of discrimination abandoned.

I will now turn to the question of whether there is a causal connection between the sustained charge and the efficiency of the service and, further, whether the penalty imposed was reasonable and did not constitute an abuse of discretion.

Aside from any evidence offered by an agency concerning the nexus question, there is nevertheless some conduct and there are some reasons with respect to which the nexus is obvious on the face of the facts. Gregory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974). Prima

facie nexus has been found to exist when the conduct or activity resulting in discipline pertains directly to the ability of the employee to perform his duties and/or the ability of the agency to properly carry out its mission; in other words, where the conduct is job related. The nexus in such instances may be presumed because it is readily apparent. Blackford v. Department of the Navy, MSPB Dkt. No. PH7528010412 (November 24, 1981).

Prima facie nexus is applicable in the present appeal. The record amply justifies the agency's position that progressive training is mandatory for an employee in the appellant's position.

The position of Air Traffic Control Specialist requires highly technical skills which must be developed pursuant to a prescribed training program. Clearly, appellant's refusal to obey an order to complete required training undermines the mission of the agency. I find that the agency has shown the requisite nexus.

I must now consider whether the agency's decision to remove the appellant based on the sustained charge was appropriate pursuant to the criteria set out in Douglas, supra. As noted above, the appellant raised the issue of disparate treatment. When an appellant raises an allegation of disparate treatment in comparison with other specified employees, the agency must prove legitimate reasons for different

treatment of the different employees by a preponderance of the evidence. Woody v. General Services Administration, 6 MSPB 410 (1981). The appellant contends that other agency employees were not required to complete training before moving to the next step or grade. In addressing that issue, the agency presented evidence that during emergency situations, i.e., the Air Traffic Controller strike, on-the-job training was substituted for academy training. Given the seriousness of the agency's mission, I find it reasonable that it could make exceptions during emergencies. The appellant has not shown that his academy training was mandated during a national crisis. Therefore, I find that he

had failed to show disparate treatment.

In this case, it cannot be said that the penalty was outside the bounds of reasonableness. In view of the appellant's consistent refusal to complete training which was scheduled at least three weeks prior to commencement, I conclude that the agency's selection of the penalty of removal was within the "tolerable limits of reasonableness" required by Douglas, 5 MSPB at 314. I therefore conclude that the agency has carried all of its burdens and that the appellant's removal was for such cause as will promote the efficiency of the service.

DECISION

The agency's action in removing the appellant is hereby AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 10, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision

may obtain judicial review by filing a petition with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(B)(1).[6]

FOR THE BOARD:

/s/ Henrietta E. Turnquest

Presiding Official

---

[6] As modified by § 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. § 1295(a)(9).

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner,	)	Appeal
v.	)	No. 85-1968
DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Dated: April 23, 1986

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). AT315H8310757

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Date: 4-23-86 /s/ Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: June 4, 1986

COSTS AGAINST PETITIONER:

Printing.....$37.60

Total.....$37.60

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner, v. DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Appeal No. 85-1968 Dated: May 28, 1986

Before BALDWIN, NIES, and ARCHER, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Dated: May 28, 1986

/s/ Francis X. Gindhart
Clerk

(By Diana Frye, Chief Deputy Clerk)

cc: Mr. Robert John Genins, Jr.
Mr. Stuart James, DOJ

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner,	)	Appeal
v.	)	No. 85-1968
DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Dated: June 9, 1986

Before BALDWIN, NIES, and ARCHER, Circuit Judges.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

June 9, 1986 /s/ Francis X. Gindhart
Date Clerk

cc: Mr. Robert John Genins, Jr.
Mr. Stuart James, DOJ

CERTIFICATE OF SERVICE

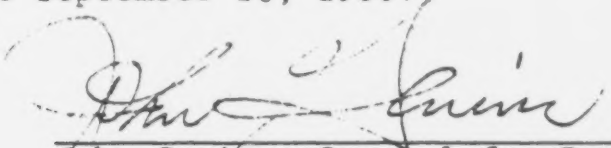
I do hereby certify that I have served the only party required to be served herein, Respondent, by my depositing in a United States mailbox, three envelopes which each contained three copies of the within Appendix and had affixed adequate first-class postage thereto, addressed to:

SOLICITOR GENERAL,
Department of Justice,
Washington, D.C., 20530

STUART JAMES, ESQ.,
Civil Division,
U.S. Department of Justice,
Room 711, 550 11th Street,
Washington, D.C., 20530

MARY JONES, ESQ.,
Office of General Counsel,
Federal Aviation
Administration,
Washington, D.C., 20590.

This September 16, 1986.



John Genins, Counsel for Petitioner,
P.O. Box 14303,
Atlanta, Georgia, 30324,
(404) 523-2838